United Nations A/CN.4/507/Add.4

General Assembly

Distr.: General
4 August 2000
English
Original: English and French

International Law Commission
Fifty-second session
Geneva, 1 May-9 June, 10 July-18 August 2000

Third report on State responsibility

by Mr. James Crawford, Special Rapporteur

Addendum

Contents

		Paragraphs
V.	Invocation of responsibility to a group of States or to the international community	368–413
	A. General considerations	369–385
	1. Right of every State to invoke responsibility for breaches of obligations to the international community	373–375
	2. Limitations on the right to invoke responsibility on behalf of another	376–379
	3. Issues of penalty and process	380–385
	B. Collective countermeasures	386–405
	1. A review of State practice	391–394
	2. An assessment	395–400
	3. Tentative conclusion	401–406
	C. Additional consequences of "gross breaches" of obligations to the international community as a whole	407–411
	D. Summary of conclusions as to Part 2, Chapter III and Part 2 *bis*	412–413
VI.	Part Four General provisions	414–429
	A. Existing articles	415–426

00-59224 (E) 090800

1. Article 37 (*Lex specialis*) 415–421
2. Article 39 (Relationship to the Charter of the United Nations) 422–426
B. Proposed additions to Part IV 427–428
C. Summary of conclusions as to Part Four 429

V. Invocation of responsibility to a group of States or to the international community*

368. Earlier sections of this Report considered the range of consequences of State responsibility for the responsible State, as well as the invocation of responsibility by the injured State or States, whether by the bringing of an international claim or, eventually, by the taking of countermeasures. Two groups of issues remain with a view to the completion of the Draft articles: (a) the invocation of the responsibility of a State towards a group of States extending beyond the State directly injured, including the invocation of responsibility towards the international community as a whole, and (b) the question of the residual and saving clauses envisaged for Part 4 of the Draft articles. This section of the Report deals with these questions in turn. Since they have already been discussed or envisaged in the course of work on the topic since 1998, it is possible to deal with them at the level of principle. For the most part, the background in law and practice for the proposals made here — to the extent it exists at all — has already been described.[718]

A. General considerations

369. In his First Report the Special Rapporteur analysed in detail the range of issues raised by articles 19 and 51-53 in respect of "international crimes".[719] Following an extensive debate,[720] the Commission provisionally decided that it would address these issues in the following way:

> "... it was noted that no consensus existed on the issue of the treatment of 'crimes' and 'delicts' in the draft articles, and that more work needed to be done on possible ways of dealing with the substantial questions raised. It was accordingly agreed that: (a) without prejudice to the views of any member of the Commission, draft article 19 would be put to one side for the time being while the Commission proceeded to consider other aspects of Part One; (b) consideration should be given to whether the systematic development in the draft articles of key notions such as obligations (*erga omnes*), peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19..."[721]

* The Special Rapporteur wishes to thank Pierre Bodeau, Jacqueline Peel, Christian Tams, Carole Moal and Arnaud Macé for their assistance in the preparation of this section of the Report.

[718] See, however, below, paras. 391-394 for a review of State practice in relation to collective countermeasures.

[719] First Report (A/CN.4/490), paras. 43-101.

[720] Described in detail in *I.L.C. Report ... 1998* (A/53/10), paras. 241-331.

[721] Ibid., para. 331.

The issue has generated a substantial further body of literature,[722] and some additional comments of governments.[723] In some cases existing positions have been restated, but there has also been some movement towards the idea that the systematic development of existing concepts — obligations to the international community as a whole, peremptory norms of international law — combined with a category of "gross" or "egregious" breaches, may respond sufficiently to the concerns raised by article 19.

370. It should be stressed that the adoption of the Draft articles with the general support of the Commission is highly desirable, if not essential. In the Special Rapporteur's view, it remains the case that no consensus can be formed around article 19 as adopted on first reading. But the same would be true of any proposal for the deletion of article 19, unless it is accompanied by the specific recognition of the importance for State responsibility of breaches of obligations to the international community as a whole, especially the most serious breaches.

371. In subsequent reports the Special Rapporteur has sought to give effect to the mandate recited in paragraph 369. To summarize:

- Compliance with the requirements of a peremptory norm of general international law is recognized as a circumstance precluding wrongfulness (article 29 *bis*), and obligations arising from peremptory norms are recognized in other respects as having priority (article 33 (2) (a), proposed article 47 *bis* (e));
- Necessity may not be invoked as a circumstance precluding wrongfulness where this would seriously impair an essential interest of the international community as a whole (article 33 (1) (b)); such an interest may also weigh in favour of the invoking State;
- The definition of "injured State" specifically recognizes the general interests of States in securing compliance with obligations to the international community as a whole (proposed article 40 *bis*).

---

[722] See e.g. G. Abi-Saab, "The Uses of Article 19", 10 *E.J.I.L.*, 1999, 339; D. W. Bowett, "Crimes of State and the 1996 Report of the International Law Commission on State Responsibility", 9 *E.J.I.L.*, 1998, p. 163; C. Dominicé, "The International Responsibility of States for Breach of Multilateral Obligations", 10 *E.J.I.L.*, 1999, 353; G. Gaja, "Should All References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?", ibid., 365; B. Graefrath, "International Crimes and Collective Security", in K. Wellens (ed.), *International Law: Theory and Practice* (Kluwer, The Hague, 1998), p. 237; A. Pellet, "Can a State Commit a Crime? Definitely, Yes!", 10 *E.J.I.L.*, 1999, 425; A. Pellet, "Vive le crime! Remarques sur les degrés de l'illicite en droit international", in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission*, New York, United Nations, 1997, 287; P. S. Rao, "Comments on Article 19 of the Draft Articles on State Responsibility Adopted by the International Law Commission", 37 *Indian J.I.L.*, 1997, 673; S. Rosenne, "State Responsibility and International Crimes: Further Reflections on Article 19 of the Draft Articles on State Responsibility", 30 *N.Y.J. Int'l L. & Pol.*, 1998, 145; R. Rosenstock, "An International Criminal Responsibility of States?" in *International Law on the Eve of the Twenty-first Century: Views from the International Law Commission*, New York, United Nations, 1997, 265; O. Triffterer, "Prosecution of States for Crimes of State", 67 *Rev. int. de droit penal*, 1996, 341; K. Zemanek, "New Trends in the Enforcement of *erga omnes* Obligations", 4 *Max Planck Y. B. of United Nations Law*, 2000, 1.

[723] For a summary of these views see A/CN.4/496 (1998), paras. 100-115; A/CN.4/504 (1999), paras. 23, 78-81.

In addition, the articles carefully distinguish between State responsibility for breaches of multilateral as distinct from bilateral obligations.

372. The question is, what remains? What is still necessary in order to fulfil the Commission's mandate? In this respect, certain preliminary remarks are called for.

- First, it is necessary to recognize that the primary means in present international relations for dealing with emergencies affecting the very existence of States or the security of populations do not lie within the scope of the secondary rules of State responsibility. They are, *inter alia*, a matter for the competent international organizations, in particular the Security Council and the General Assembly.

- No doubt there are questions of the accountability and proper functioning of the Security Council and of other organizations faced with emergencies. It is significant, however, that such questions concern as much things not done as things badly done — the failure of timely intervention that could, perhaps, have averted a disaster, the formal promise as to the safety of "safe havens" that was dishonoured by inaction and lack of will.[724] To repeat, whatever institutional and other reforms may help to address these questions, they are not matters which can be resolved by way of the general secondary rules of State responsibility.

- For these and other reasons, it has already been provisionally agreed that the notion of "lawful sanctions" implicit in article 30 should be eliminated. Sanctions adopted pursuant to Chapter VII of the United Nations Charter, or otherwise validly imposed under international treaties, fall outside the scope of the project, and are covered respectively by articles 39 and 37-38.[725]

- One key feature of such sanctions is that their imposition and monitoring requires organized collective action. The substantial systems of sanctions committees, procedures for authorizations and exceptions, the consideration of compensation to affected third States pursuant to article 50 of the Charter, deciding on the relations between non-forcible sanctions, peacekeeping and other measures — none of these are achievable within the scope of the Draft articles, nor is there any value in seeking to duplicate them by any parallel systems that could be envisaged.[726]

- A significant development in recent years has been the establishment of an International Criminal Court. Events during the 1990s have shown again the limited results that can flow from the sanctioning of whole populations, and the dilemma of appearing to punish many in order to sanction a few controlling figures. Where humanitarian or other tragedies are produced, or exacerbated, by the criminal conduct of individual leaders (whether or not they are formally in government), responses against the "State" or its people seem to miss the

[724] See e.g. Report of the Secretary-General pursuant to General Assembly resolution 53/35, The fall of Srebrenica, A/54/549, 15 November 1999; Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, 15 December 1999, and the statement of the Secretary-General of 16 December 1999.

[725] For art. 38 see above, paras. 60-65; for art. 37, below, paras. 415-421; for art. 39, below, paras. 422-426.

[726] Any such systems would have to be in treaty form, whereas the form of the Draft articles has not been decided: see above, para. 6.

point. In the majority of cases of large scale criminal conduct, the people of the State concerned are, either directly or collaterally, victims. Mechanisms are now being developed — of which the Rome Statute is but one element — for holding the individuals involved accountable. In this enterprise, State responsibility has a role, but it is ancillary.[727]

- In particular, it has not been suggested that individual criminality under international law depends on any prior finding of the criminality of the State concerned. Were it to do so, difficult questions would be raised, since either there would be a need for a preliminary finding against the State itself,[728] or the State would be dragged into the criminal court as an "absent" accused. This is not the way to achieve due process, for States or for individuals.[729]

In short, the general law of State responsibility can only play an ancillary role in this field. But there is such a role. In accordance with the provisions of Part 1 of the Draft articles, States as such may be responsible for gross breaches of fundamental obligations, and the consequences of that situation are correspondingly substantial: accountability to the international community as a whole, the obligation to cease the breach and to make full reparation for it, especially by way of restitution, and the possibility of significant countermeasures if these obligations are not fulfilled. In seeking to elaborate this role, certain key ideas need to be developed.

1. Right of every State to invoke responsibility for breaches of obligations to the international community

373. In the context of State responsibility, it is appropriate to begin with the notion of obligations to the international community as a whole. One may infer that the content of those obligations is largely coextensive with the content of the peremptory norms. By definition a peremptory norm must have the same status vis-à-vis all States.[730] It arises under general international law and local or conventional derogations from it are prohibited. It is conceivable that an obligation might exist *erga omnes* which was subject to variation as between two particular States by agreement between them. It would follow that the obligation was not peremptory. But it would equally follow that, in the event of a derogation, the *same* obligation was not owed to the international community as a whole.

374. However this may be, it is proposed to consider as the essential core of obligations to the international community as a whole those few norms which are

[727] For the role of criminal or disciplinary sanctions against individuals as a form of satisfaction in special cases, see above, para. 192.

[728] Cf. the two-stage procedure applied to "criminal organizations" under the Charter of the International Military Tribunal (annexed to the London Agreement of 8 August 1945), arts. 9-11. It is very doubtful whether these provisions (which, of course, were not applied to the German Government as such) were among the "principles of international law" affirmed by General Assembly resolution 95 (I) of 11 December 1946. They have not since been reflected in any international resolution or treaty.

[729] It is sometimes said that State participation in a crime under international law renders the State "transparent", thereby denying protection to its officials charged with international crimes. But the principle (affirmed in art. 7 of the Charter of the I.M.T. and repeatedly since) that the official position of a person accused of an international crime "shall not be considered as freeing them from responsibility or as mitigating punishment" applies irrespective of whether the official's conduct formed part of a "crime of State".

[730] See Vienna Convention on the Law of Treaties, 1969, art. 53.

generally accepted as universal in scope and non-derogable as to their content, and in the performance of which all States have a legal interest. This was the category which the Court seemed to have in mind in its dictum in the *Barcelona Traction* case.[731] It is not necessary (indeed it is undesirable) for the Draft articles to cite examples of such norms. They include the prohibition of the use of force in international relations, the prohibitions of genocide and slavery, the right of self-determination, and those other human rights and humanitarian law obligations which are recognized as non-derogable by general international law. The commentary should make it clear that the category includes only a small number of universally accepted norms.

375. With respect to this category of obligations, all States should be recognized as having a legal interest in compliance, whether or not the State is specially affected by their breach.[732] This entails, as a minimum, that all States have a legal interest to secure cessation of any breach of these norms and to obtain appropriate assurances or guarantees of non-repetition. The Draft articles should give effect to that entailment. It may be noted that there is no risk of conflict or contradiction where several or many States seek the cessation of a breach, or a declaration of a breach (or for that matter restitution, where what is to be restored is an objective situation, the *status quo ante*, in the interests of the victims of the breach[733]). That being so, to limit such invocation to cases where all or virtually all States could agree to act would be too limiting. Any State party to an obligation established in the collective interest should be recognized as having at least the right to protest, to seek cessation and a declaration of the breach, and in appropriate cases to seek restitution.

2. Limitations on the right to invoke responsibility on behalf of another

376. On the other hand, even if the right of each State to invoke responsibility in respect of obligations to the international community as a whole is to be recognized as an individual one, it is not a right established for the personal interest of that State but in the community interest. It is distinct from the interest of a State, person or entity which is the specific victim of the breach (a State subject of an armed attack, a people denied the right of self-determination ...). Not-directly-affected States[734] asserting a legal interest in compliance are not seeking cessation or reparation on their own behalf but on behalf of the victims of the breach and in the public interest. It seems then that provisions for the invocation of responsibility on behalf of the international community need to acknowledge the primacy of the interests of the actual victims. In considering how this is to be achieved, it is necessary to consider separately the case where the victim is a third State, as distinct from a human group or other entity.

---

[731] *I.C.J. Reports* 1970, p. 3 at p. 32 (para. 33); above, para. 97.

[732] See above, paras. 106-107 and table 1. An appropriate analogy here is the idea of *locus standi* in the public interest; it may be noted that human rights and many other treaties give State parties generally the right to invoke responsibility, at least for the purposes of obtaining a declaration of a breach, without imposing any threshold requirement of their being specially affected.

[733] See above, para. 113.

[734] Such as Ethiopia and Liberia in the *South West Africa* cases, *I.C.J. Reports* 1966, p. 6.

The victim State

377. Where there is an identifiable victim State, then collective measures taken on its behalf, including in relation to reparation, should be taken with its consent.[735] Difficulties can arise where the government of the victim State has been suppressed or overthrown, e.g. as a result of unlawful intervention from outside or of a coup, and where the victim State lacks valid representatives. This extreme case has certainly occurred, but it must be left to be resolved by existing law and practice relating to the representation of the State in times of emergency, and by the competent international organizations.[736] It should not be allowed to obscure the normal situation where the victim State continues to be validly represented at the international level.

Victims other than States: peoples and populations

378. In principle, the same solution might be envisaged where the primary victim is not a State but a human group or an individual. For obvious reasons, however, there may be great difficulties in securing legitimate representation by human groups or individuals, and in limiting the rights of other States to address issues of compliance at an international level, in the absence of a valid expression of the wishes of the victim or victims.[737] In any event, such States may be properly concerned as to the issues of international legality, without necessarily identifying with the victims or seeking to represent them. It has already been proposed that Parts 2 and 2 *bis* should not deal with the question of the invocation of responsibility by entities other than States, and an appropriate saving clause has been recommended in Chapter I of Part 2.[738] As to the invocation of responsibility by a State in cases where the primary victim is a non-State, the Draft articles should provide that any State party to the relevant collective obligation should have the right to invoke responsibility by seeking cessation, assurances and guarantees of non-repetition and, where appropriate, restitution.

"Victimless" breaches of community obligations

379. If there are no specific, identifiable victims (as may be the case with certain obligations *erga omnes* in the environmental field, e.g. those involving injury to the "global commons"), and if restitution is materially impossible, then other States may be limited to seeking cessation, satisfaction and assurances against repetition. Again, however, these are significant in themselves, and any State party to the relevant collective obligation should be entitled to invoke responsibility in these respects.

3. Issues of penalty and process

380. Evidently questions of cessation, non-repetition and restitution do not exhaust the potential consequences that may flow from a breach of obligations to the

[735] See above, para. 109.

[736] For a review see S. Talmon, *Recognition of Governments in International Law* (Oxford, Clarendon Press, 1998), who seeks to reinstate the doctrine of recognition of governments-in-exile as the means of resolving such problems.

[737] Cf. the problem of representation referred to by Judge Vereshchetin in his separate opinion in the *Case concerning East Timor, I.C.J. Reports*, 1995, p. 90 at p. 135.

[738] See above, para. 99, and for the text of the proposed provision see para. 119.

international community as a whole. Other consequences might include substantial damages reflecting the gravity of the breach, and even outright penalties. Indeed monetary payments are at the low end of the spectrum of possible consequences.[739] But the question of penalties or punitive damages is a useful test case. It will be recalled that the Draft articles as adopted on first reading did not provide for punitive damages even in the case of "international crimes" as defined in article 19.[740] The exclusion of punitive damages in international law received support even from governments which otherwise favoured article 19.[741] Indeed, there is substantial authority for the proposition that punitive damages do not exist in international law.[742] In the Special Rapporteur's view, while responsibility may be invoked by States individually in order to ensure cessation and restitution in *all* cases involving breaches of obligations towards the international community as a whole,[743] the question must also be asked whether penalties or punitive damages can be provided for at least in the case of gross or egregious breaches. If the answer is no, then in this field the Draft articles can have only a limited scope, and the development of the secondary consequences by way of penalties for gross breaches will have to be left to the future. And this would be so, whether the reason given was the absence of any provision for punitive damages in international law, or the absence of any mechanism for imposing them, or its unacceptability to States for pragmatic reasons, or the impossibility of imposing such a regime in a text which does not have the force of a widely accepted treaty.[744]

381. It must be stressed that, despite the substantial debate that has surrounded article 19 and the notion of international crimes of States, practice has been almost entirely lacking. Active steps have been taken to implement the notion of international criminal responsibility for certain crimes under international law, and existing principles of international responsibility have been applied, under the auspices of the Security Council, to certain grave breaches, most notably the situation resulting from Iraq's invasion of Kuwait in 1990. But legally and institutionally, arrangements for holding States accountable for the worst breaches of international law remain essentially as they were when article 19 was first proposed and adopted.

382. The situation may be compared with that under European Union law, so far the most developed supranational regulatory system. In particular, reference may be made to article 228 of the European Communities Treaty (formerly article 171), which provides:

---

[739] Cf. the various consequences visited upon Iraq in the aftermath of its invasion of Kuwait, or on 1945 Germany in the aftermath of the Holocaust and the Second World War.

[740] There is no reference to punitive damages in article 53. As already demonstrated, the Commission in adopting article 45 (2) (c) did not intend to provide for punitive damages: see above, para. 190.

[741] See First Report (A/CN.4/490, 1998), para. 60.

[742] See the decisions referred to, ibid., para. 63, and see above, paragraph 190.

[743] See above, para. 375.

[744] This does not exhaust the catalogue of possible reasons. The international community is beginning to take seriously the imposition of penalties on individuals, including present and former governmental figures, who have committed egregious international crimes. That task might be thought more immediate and urgent than the penalizing of States and (indirectly) their populations.

> "1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
>
> 2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.
>
> If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.
>
> If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it ..."[745]

In 1996 the European Commission adopted guidelines for applying this provision, and in 1997 it adopted further guidelines on methods of calculating penalty payments. The first case in which these provisions were actually applied against a State occurred in 2000, when the Court of Justice of the European Communities imposed a penalty for a continuing breach of EU law of €20,000 per day. This was imposed for the continuing dumping of harmful wastes into a river. In the course of its Opinion, the Court summarized the effect of the Commission's guidelines for penalties as follows:

> "Memorandum 96/C 242/07 states that decisions as to the amount of a fine or penalty payment must be taken with an eye to their purpose, namely the effective enforcement of Community law. The Commission therefore considers that the amount must be calculated on the basis of three fundamental criteria: the seriousness of the infringement, its duration and the need to ensure that the penalty itself is a deterrent to continuation of the infringement and to further infringements. Communication 97/C 63/02 identifies the mathematical variables used to calculate the amount of penalty payments, that is to say a uniform flat-rate amount, a coefficient of seriousness, a coefficient of duration, and a factor intended to reflect the Member State's ability to pay while ensuring that the penalty payment is proportionate and has a deterrent effect, calculated on the basis of the gross domestic product of the Member States and the weighting of their votes in the Council."[746]

---

[745] This procedure is stated to be without prejudice to article 227, which allows any Member State which considers that another Member State has failed to fulfil any obligation under the Treaty to bring the matter before the Court, in effect for declaratory relief. However article 228 is the only procedure by which penalties can be imposed on Member States.

[746] Case C-387/97, *Commission of the European Communities v. Hellenic Republic*, judgment of 4 July 2000, paras. 85-86, citing EC memorandum 96/C 242/07, 21 August 1996 (*O.J.E.C.* 1996 C 242, p. 6) and communication 97/C 63/02, 28 February 1997 (*O.J.E.C.* 1997 C 63, p. 2).

The Court noted that these guidelines "help to ensure that [the Commission] acts in a manner which is transparent, foreseeable and consistent with legal certainty and are designed to achieve proportionality in the amounts of the penalty payments to be proposed".[747] It approved the suggestion that the penalty amounts take into account national GDP and the State's voting power in the Council, on the ground that this "enables that Member State's ability to pay to be reflected while keeping the variation between Member States within a reasonable range".[748] It concluded that ...

> "the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations. In the present case, having regard to the nature of the breaches of obligations, which continue to this day, a penalty payment is the means best suited to the circumstances."[749]

In reducing the penalty proposed by the Commission, the Court took into account that not all the continuing violations of the earlier judgment alleged by the Commission had been proved. At the same time, the continuing infringements, in view of their capacity to "endanger human health directly and harm the environment", as well as their inconsistency with EU environmental policy, were to be regarded as "particularly serious".[750]

383. How the penalty procedure under article 228 will evolve is a matter for the future, and of course the procedure exists only in relation to EU law as such, not international law. A number of points may, however, be made:

- the procedure shows that, despite occasional claims to the contrary, there is nothing in the notion of the State or of treaty-based legal relations that excludes, *a priori*, the imposition of penalties;
- penalties under article 228 are not denominated as "criminal", and their intention, primarily at least, is to enforce compliance;[751]
- they are imposed only in special cases, at the request of a collective organ, after a two-stage proceeding before a court with general and compulsory jurisdiction, and with all the accompaniments of due process;
- they are imposed in a system in which countermeasures are excluded.[752]

384. It seems to the Special Rapporteur clear that in the present stage of development of international law, the conditions for the regular imposition of

---

[747] Judgment of 4 July 2000, para. 87.

[748] Ibid., para. 88; cf. ibid., para. 89, where the EC's guidelines are described as "a useful point of reference".

[749] Ibid., para. 92.

[750] Ibid., para. 94.

[751] The Court of Justice rejected the respondent's argument that the proceedings were inadmissible because there was a retrospective element to the penalty. It noted that "the argument put forward ... concerning the relevance, when setting the penalty payment, of factors and criteria relating to the past is indissociable from consideration of the substance of the case, in particular as regards the object of penalty payments under Article 171 (2) of the Treaty": ibid., para. 42.

[752] See above, para. 343.

penalties upon States do not exist, and can only with great difficulty be created. The Court of Justice referred to the need for transparency, certainty and proportionality. These are general legal requirements of due process in penal matters. They are not confined to legal sub-systems such as that of the European Union.

385. But if there are difficulties in imposing penalties or similar sanctions on States in the absence of adequate institutions and procedures, there is on the other hand the practice of applying countermeasures in order to induce a State to comply with its international obligations. Special regimes apart, such countermeasures do not require the prior exhaustion of judicial remedies, let alone prior judicial authorization.[753] If the injured State is entitled to apply countermeasures as a decentralized form of seeking redress, the question is why it cannot be supported in doing so by other States which themselves have a recognized interest in compliance with the obligation breached. There is a further question, whether "collective countermeasures" should be allowed to one or some States faced with the breach of an obligation to the international community as a whole which does not directly injure any State (e.g. in the field of human rights or internal armed conflict).

B. Collective countermeasures[754]

386. A previous section of this Report reviewed the provisions on countermeasures as adopted on first reading, so far as they concern actions taken by injured States in the narrow sense (i.e. as proposed to be defined in article 40 *bis* (1)). The question is to what extent other States may legitimately assert a right to react against breaches of collective obligations to which they are parties, even if they are not injured in this sense. For the sake of simplicity, these cases will be discussed under the rubric of "collective countermeasures". They are not limited to situations where some or many States act in concert. The collective element may also be supplied by the fact that the reacting State is asserting a right to respond in the public interest to a breach of a multilateral obligation to which it is a party, though it is not individually injured by that breach, or that the measures are coordinated by a number of involved States.

387. It is important to distinguish between individual countermeasures, whether taken by one State or by a group of States each acting in its individual capacity and through its own organs, on the one hand, and institutional reactions in the framework of international organizations, on the other. The latter situation, for example where it occurs under the authority of Chapter VII of the United Nations Charter, is not covered by the draft articles.[755] More generally the draft articles do

[753] See above, para. 355.

[754] There is a valuable discussion of these issues by L-A. Sicilianos, *Les réactions décentralisées à l'illicite* (Paris, LDGJ, 1990), pp. 110-175 (hereafter Sicilianos). See also M. Akehurst, "Reprisals by Third States", 44 *B.Y.I.L.* (1970) 1; J. I. Charney, "Third State Remedies in International Law" (1989) 10 *M.J.I.L.* 57; J. A. Frowein, "Reactions by Not Directly Affected States to Breaches of Public International Law", 248 *Recueil des cours* (1994-IV) 345; D. N. Hutchinson, "Solidarity and Breaches of Multilateral Treaties", 59 *B.Y.I.L.* (1988) 151; B. Simma, "From Bilateralism to Community Interest in International Law" (1994) 250 *Recueil des cours* (1994-VI) 217.

[755] See existing art. 39, discussed below, paras. 422-426.

not cover the case where action is taken by an international organization, even though the member States direct or control its conduct.[756]

388. A second necessary distinction is that between "unfriendly" but not unlawful reactions to the conduct of another State (retorsion) and those reactions which are inconsistent with the international obligations of the State and are justified, if at all, as legitimate countermeasures. While the distinction may sometimes be difficult to draw in practice, especially in the context of collective action, it is crucial for the purposes of State responsibility. Only countermeasures properly so-called fall within the scope of the Draft articles.[757] Thus countermeasures do not include policies of collective non-recognition, whether such non-recognition is obligatory[758] or optional.

389. Thirdly, non-forcible countermeasures must be clearly distinguished from reactions involving the use of force. Measures involving the use of force in international relations, or otherwise covered by article 2 (4) of the Charter, are regulated by the relevant primary rules, and do not fall within the scope of the secondary obligations covered by the Draft articles. This has already been affirmed in the context of existing article 50.[759]

390. On these understandings it is proposed, first, briefly to review some examples of recent experience concerned with collective countermeasures as defined, secondly, to attempt an assessment of that practice, and thirdly to consider, in the light of this practice, what provisions ought to be made in the Draft articles. It should be stressed that this is not a matter of *introducing* into the draft articles provisions for collective countermeasures. As adopted on first reading, the Draft articles allowed any injured State (broadly defined in the original article 40) to take countermeasures on its own account, without regard to what any other State might be doing, and in particular without regard to the views or responses of the victim State. The deficiencies of such a broad approach to collective countermeasures have already been considered.[760] Thus the question is rather how the presently unlimited and uncoordinated provision for collective countermeasures, created by article 40 read in conjunction with article 47, is to be limited and controlled.

---

[756] See below, para. 428 for the proposed exclusion from the Draft articles of questions concerning responsibility for the acts of international organizations.

[757] Thus collective diplomatic boycotts, avoidance of State visits or sporting links, etc. do not breach international law and while their intent may be hostile or unfriendly, they do not involve countermeasures. The collective action taken by the OAU against the apartheid system in South Africa also seems not to have involved countermeasures in the strict sense, in the absence of relevant treaty obligations with South Africa as to trade or aviation, etc. See K. W. Ferguson-Brown, "The Legality of Economic Sanctions against South Africa in Contemporary International Law", 14 *South African Yearbook of International Law*, p. 59 (1988-1989); cf. C. J. R. Dugard, "The Organization of African Unity and Colonialism" (1967) 16 *I.C.L.Q.* 157 (referring to self-defence rather than countermeasures). The collective measures against Rhodesia were taken pursuant to Chapters VI and later VII of the Charter: see V. Gowland-Debbas, *Collective Responses to Illegal Acts in International Law* (Nijhoff, Dordrecht, 1990), ch. 5.

[758] As, for example, in the situation considered by the International Court in the *Namibia Opinion*, *I.C.J. Reports*, 1971, p. 16.

[759] See above, para. 335.

[760] See above, paras. 109, 114.

1. A review of State practice

391. In a number of instances, States have reacted against violations of collective obligations, although they could not claim to be injured in the sense of article 40 *bis* (1). Reactions have taken such forms as economic sanctions (contrary to treaty obligations) or other measures (e.g. the breaking off of air links in disregard of bilateral aviation treaties; the freezing of assets). Examples include the following:

- *USA — Uganda (1978).* In October 1978, the US Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda.[761] As GATT members, the United States and Uganda were obliged not to introduce general export restrictions and quotas in their economic relations.[762] The United States however did not rely on GATT exceptions: the legislation recited that "[t]he Government of Uganda ... has committed genocide against Ugandans" and that the "United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide".[763]

- *Certain western countries — Poland and Soviet Union (1981).* On 13 December 1981, following the movement of Soviet troops along Poland's eastern border, the Polish government imposed martial law and subsequently suppressed demonstrations and interned 12,500 dissidents.[764] After verbal condemnations from individual United Nations members, the United States and other western countries took action against both Poland and the Soviet Union. Besides unfriendly acts, the measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, Great Britain, France, the Netherlands, Switzerland and Austria.[765] In all those instances, the suspension procedures provided for in the respective treaties were disregarded, and (unless their wrongfulness was precluded) the measures thus constituted violations of international law.[766]

- *Collective measures against Argentina (1982).* In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal.[767] Following a request by the United Kingdom, EC members, Australia, New Zealand and Canada went beyond the sphere of verbal condemnations and adopted trade sanctions. These included a temporary prohibition on all imports of Argentinean products, which ran contrary to article XI:1 and possibly article III of the GATT. It is doubtful whether the measures could be justified under the national security exception provided for in article XXI (b) (iii) of the GATT.[768] Moreover, the embargo

[761] Uganda Embargo Act, 22 USC s. 2151 (1978), §§ 5c, 5d.

[762] Cf. GATT, art. XI:1.

[763] 22 USC s. 2151 (1978), §§ 5c, 5d.

[764] Cf. C. Rousseau, "Chronique des faits internationaux" (1982) 86 *R.G.D.I.P.* at pp. 603-4.

[765] Sicilianos, pp. 161-2; Rousseau (1982) 86 *R.G.D.I.P.* at p. 607.

[766] See e.g. art. XV of the U.S.-Polish agreement of 1972, 23 U.S.T. 4269; art. XVII of the U.S.-Soviet agreement of 1967 (1967) 6 I.L.M. 82 (1968) 7 I.L.M. 571.

[767] SC Resolution 502 (1982), 3 April 1982.

[768] Western States' reliance on this provision was disputed by other GATT members, cf. Communiqué of western countries, GATT L. 5319/Rev.1 and the statements by Spain and Brazil, GATT Doc. C/M/157, pp. 5-6. For an analysis see H. Hahn, *Die einseitige Aussetzung von GATT-Verpflichtungen als Repressalie* (Berlin, Springer, 1996), pp. 328-34; Sicilianos, p. 163.

adopted by the European countries also constituted a suspension of Argentina's rights under two sectoral agreements on trade in textiles and trade in mutton and lamb,[769] for which security exceptions of GATT did not apply.

- *USA — South Africa (1986).* When in 1985, the South African government declared a state of emergency in large parts of the country, the UN Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations.[770] Subsequently, some countries introduced measures which went beyond those recommended by the Security Council and which involved *prima facie* breaches of international law. For example, the United States Congress adopted the Comprehensive Anti-Apartheid Act (CAA) which suspended, with immediate effect, landing rights of South African Airlines on US territory.[771] This immediate suspension was contrary to the terms of the 1947 US-South African aviation agreement[772] and was justified as a measure which should encourage the South African government "to adopt measures leading towards the establishment of a non-racial democracy".[773]

- *Collective measures against Iraq (1990).* On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The UN Security Council immediately condemned the invasion as a breach of international peace and security and, from 6 August onwards, adopted a series of resolutions legitimizing reactions of member States to restore the Kuwaiti government. Even before member State action was authorized by the Security Council, EC member States and the United States adopted trade embargoes and decided to freeze Iraqi assets.[774] This action was taken in direct response to the Iraqi invasion and, at least initially, was not legitimized by Security Council resolutions.

- *Collective measures against Yugoslavia (1998).* In response to the humanitarian crisis in Kosovo, the member States of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.[775] For a number of countries, such as Germany, France and the United Kingdom, the latter measure implied the breach of bilateral aviation agreements.[776] Because of doubts about the legitimacy of the action, the British government initially was prepared to follow the one-year denunciation procedure provided for in article 17 of its agreement with Yugoslavia. However, it later changed its position and denounced flights with immediate effect. Justifying the measure, it stated that "President Milosevic's ... worsening record on human rights means that, on moral and political grounds, he has forfeited the right of his Government to insist on the

[769] The treaties are reproduced in: *O.J.E.C.* 1979, L 298, p. 2; *O.J.E.C.*, 1980, L 275, p. 14.

[770] SC Resolution 569 (1985), 26 July 1985. For further references see Sicilianos, p. 165.

[771] CAA, s. 306, in (1987) 26 I.L.M. 79; Implementation order, ibid., p. 104.

[772] 66 U.N.T.S. 233, art. VI.

[773] For the implementation order, see (1987) 26 I.L.M. 105 (referring to CAA, s. 4).

[774] See e.g. President Bush's Executive Orders of 2 August 1990, reproduced in (1990) 84 *A.J.I.L.* pp. 903-5.

[775] Common positions of 7 May and 29 June 1998, *O.J.E.C.* 1998, L 143 (p. 1) and L 190 (p. 3); implemented through EC Regulations 1295/98 (L 178, p. 33) and 1901/98 (L 248, p. 1).

[776] See e.g. U.K.T.S. 1960, No. 10; R.T.A.F. 1967, No. 69.

12 months notice which would normally apply."[777] The Federal Republic of Yugoslavia protested these measures as "unlawful, unilateral and an example of the policy of discrimination".[778]

392. In some other cases, "interested" States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations. However, they did not rely on a right to take countermeasures, but asserted instead a right to suspend the treaty because of a fundamental change of circumstances. Two examples may be given:

- *Netherlands — Surinam (1982).* In 1980, a military government seized power in the former Dutch colony of Surinam. In response to a crackdown by the new government on opposition movements in December 1982, the Dutch government suspended the bilateral treaty on development assistance under which Surinam was entitled to financial subsidies until 1985.[779] While the treaty itself did not contain any suspension or termination clauses, the Dutch government stated that the human rights violations in Surinam constituted a fundamental change of circumstances which gave rise to a right of suspension.[780]

- *EC Member States — Yugoslavia (1991).* A similar line of reasoning was advanced by EC member States in their relation to Yugoslavia. In the autumn of 1991, in response to resumption of fighting within Yugoslavia, EC members suspended, and later denounced, the 1983 Co-operation Agreement with Yugoslavia.[781] This led to a general repeal of trade preferences on imports and thus went beyond the weapons embargo ordered by the Security Council in its Resolution 713 of 25 September 1991. The reaction was incompatible with the terms of the Co-operation Agreement, which did not provide for the immediate suspension but only for denunciation upon six months' notice.[782] Justifying the suspension, EC member States explicitly mentioned the threat to peace and security in the region. But as in the case of Surinam, they relied on fundamental change of circumstances, rather than asserting a right to take countermeasures.[783]

393. These examples are illustrative rather than exhaustive. They show a certain willingness on the part of some States to resort to countermeasures in response to violations of collective obligations. In other cases, it is not always easy to decide

[777] Cf. "UK Materials on International Law 1998" (1998) 69 *B.Y.I.L.* pp. 580-1. The British position is again summarized in "UK Materials on International Law 1999" (1999) 70 *B.Y.I.L.* pp. 555-6.

[778] Statement of the Government of the Federal Republic of Yugoslavia on the Suspension of Flights of Yugoslav Airlines, 10 October 1999: S/1999/216.

[779] Lindemann, "Die Auswirkungen der Menschenrechtsverletzungen auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam", (1984) 44 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* pp. 68-69. The relevant treaty is reprinted in *Tractatenblad* 1975, No. 140.

[780] P. Siekmann, "Netherlands State Practice for the Parliamentary Year 1982-1983" (1984) 15 *Netherlands Yearbook of International Law* 321.

[781] *O.J.E.C.* 1983, L 41, p.1. See *O.J.E.C.* 1991, L 315, p.1, for the suspension, and L 325, p. 23, for the denunciation.

[782] Cf. art. 60 (2) of the Agreement.

[783] Equally the European Court of Justice relied on the law of treaties and not the law of State responsibility in upholding the validity of the EC regulation in question: see Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, judgment of 16 June 1998, paras. 53-59.

whether the actions already involved conduct inconsistent with international obligations or were cases of unfriendly but lawful acts by way of retorsion. For example, the measures taken by western countries against the Soviet Union following the invasion of Afghanistan may be mentioned. While most of the measures probably constituted acts of retorsion, the most controversial reaction, the United States embargo on cereal exports, may have violated its commitment to the Soviet Union under bilateral agreements.[784]

394. In a number of other cases, it seems that "interested" States at least asserted a right to resort to countermeasures in response to violations of collective obligations, although their actual responses fell short of being countermeasures. In this regard, mention can be made of various declarations adopted at G-7 summits calling for collective action against countries harbouring airline terrorists.[785] The reaction of certain States in supporting the United States at its request during the crisis concerning the diplomatic and consular personnel suggests that the reacting States were prepared to take countermeasures, although the measures actually taken arguably remained mere retorsions.[786]

2. An assessment

395. The survey shows that in a considerable number of instances States, which were not "injured" in the sense of article 40 *bis* (1), have taken measures against a target State in response to prior violations of collective obligations by that State. Moreover in some cases at least, those measures were themselves in breach of (or would otherwise have been in breach of) the obligations of the State taking the measures vis-à-vis the target State. This seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation, as these have been defined earlier in this Report.[787]

396. However, this statement must be qualified in a number of respects.

- First, it has to be frankly admitted that practice is dominated by a particular group of States (i.e. western States). There are few instances in which, for example, States from Africa or Asia have taken collective countermeasures.[788]
- Secondly, practice is selective; in the majority of cases involving violations of collective obligations, no reaction at all has been taken, apart from verbal condemnations.
- Thirdly, even if coercive measures were taken, they were not always designated as countermeasures. The Dutch government's decision to rely on

[784] While the terms of the agreement were observed, the US Government had unilaterally given permission for the purchase of larger quantities of cereals. These were annulled by the US embargo. See Sicilianos, p. 158.

[785] See the Bonn Declaration, (1978) 17 I.L.M. 1285. Subsequent declarations can be found in (1981) 20 I.L.M. 956; (1986) 25 I.L.M. 1005.

[786] Cf. the analysis by J. A. Frowein, "Reactions by not Directly Affected States to breaches of International Law" (1994) 248 *Recueil des cours* 417; Sicilianos, pp. 159-160.

[787] See above, paras. 83, 92.

[788] But for collective action in the context of Southern Africa see above, note 758.

fundamental change of circumstances in order to suspend its treaty with Surinam seems to imply a preference for other concepts.[789]

397. It must be admitted that practice does not allow clear conclusions to be drawn as to the existence of a right of States to resort to countermeasures, in the absence of injury in the sense of article 40 *bis* (1). On the other hand, a number of observations can be made.

398. First, there does not appear to exist a distinction based on the legal source of the collective obligation which has been violated. In the examples given, States have reacted against breaches of conventional as well as customary international law. Of course, resort to countermeasures will be excluded in response to violations of treaties which generally exclude the application of general rules of international law, or which contain their own provisions for authorizing collective measures. But on the other hand, the mere existence of conventional frameworks including monitoring mechanisms (e.g. in the field of human rights) has not been treated as excluding recourse to countermeasures.

399. Furthermore, despite the selectiveness of practice, none of the instances concerns isolated or minor violations of collective obligations. If States have resorted to countermeasures in response to violations of collective obligations, the violation had been seen to have reached a certain threshold.[790] Indeed the examples referred to involve some of the major political crises of recent times. With all due caution, it seems possible to say that reactions were only taken in response to severe violations of collective obligations.

400. Finally, in cases involving one directly injured State (i.e. a victim State as well as other "interested" third States), the victim State's reaction seems to have been treated as legally relevant, if not decisive, for all other States. For example, during the Falklands conflict and the Teheran hostage crisis, States other than the United Kingdom and the United States respectively only acted upon the appeal of those States as the direct victims, and only within the scope of the appeal made. Where a State is the victim of a breach (and other States' interest in the breach, if any, is of a more general character), it seems appropriate that the victim State should be in a position to decide whether and what countermeasures should be taken, within the overall limits laid down by the Draft articles. Third States should not be able, in effect, to intervene in a dispute by taking countermeasures if the principal parties wish to resolve it by other means. There is here an analogy with collective self-defence. In the *Nicaragua Case (Merits)*, the International Court noted that action by way of collective self-defence could not be taken by a third State except at the

[789] Above, para. 392. It may be noted that stringent conditions are applicable to fundamental change of circumstances under article 62 of the Vienna Convention on the Law of Treaties, as interpreted and applied for example in the *Case concerning the Gabčíkovo Nagymaros Project, I.C.J. Reports*, 1997, p. 7. It is accordingly doubtful that such a doctrine will be applicable in many of these cases. The point is, however, that in some cases governments have preferred to rely on (possibly inapplicable) grounds for the termination of treaties rather than on countermeasures.

[790] It is not the function of the Special Rapporteur, or the Commission, to judge in particular cases whether more or less widely shared perceptions of egregious breaches actually corresponded to the facts. States taking countermeasures do so at their peril, and the question whether they are justified in any given case is one for objective appreciation: see above, para. 289. The point is rather that the States taking these measures asserted that they were justified on the basis — and by clear implication, only on the basis — that the grounds invoked were genuine, serious and, if established, warranted such a response.

request of the primary obligee (the State subjected to the armed attack).[791] Yet, of course, the rules relating to the use of force give rise to obligations *erga omnes*: they are collective obligations. The *Nicaragua* case was referred to by the Court in the *Gabčíkovo-Nagymaros* case as relevant to the law of countermeasures,[792] and the analogy seems a reasonable, if not a compelling, one. If State A cannot act in collective self-defence of State B without State B's consent, it does not seem appropriate to hold that it could take (collective) countermeasures in cases where State B is the victim, irrespective of State B's wishes. On the other hand, if State A, a member of the international community to which the obligation is owed, cannot take proportionate countermeasures on behalf of State B, the victim of the breach, then State B is in effect left to face the responsible State alone, and a legal relationship based on multilateral obligation is effectively converted to a bilateral one at the level of its implementation. That too does not seem right as a matter of principle.

3. Tentative conclusion

401. The conclusions to be drawn from the practice reviewed above are necessarily tentative; the practice is rather sparse and involves a limited number of States. Nonetheless there is support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. If other States are entitled to invoke responsibility on account of such breaches, at least in terms of seeking cessation and assurances of non-repetition, as well as restitution on behalf of the injured State,[793] it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that State. Of course such countermeasures should comply with the conditions laid down for the injured State itself,[794] and in addition their "collective" character should be recognized. Thus all the countermeasures taken in relation to a particular breach should be considered in determining whether the response is, overall, proportionate. In addition, if the responsible State is cooperating with the injured State in the resolution of the dispute, other States should respect that process. This can be achieved by limiting the action of "third" States to countermeasures that would have been legitimate if taken by the injured State itself.

402. It is therefore proposed to alter the position of the Draft articles on the question of collective countermeasures by limiting the extent to which States, not themselves directly injured by a breach of multilateral obligation, can take action by way of countermeasures. In contrast to the position taken on first reading, the Draft articles should make clear that the distinction, proposed to be incorporated in article 40 *bis*, between injured States and other States entitled to invoke responsibility, has repercussions on the right of the broader group of States to resort to countermeasures. In cases where the violation of a collective obligation directly injures one State, other States bound by the obligation and falling within the definition proposed in article 40 *bis* (2) should be entitled to take countermeasures on behalf of the injured State, with that State's request and consent and within the scope of the consent given. In addition, it will be necessary to adapt the regime of

---

[791] *I.C.J. Reports*, 1986, p. 14 at p. 105 (para. 199).

[792] *I.C.J. Reports*, 1997, p. 7 at p. 55 (para. 83).

[793] See above, para. 377.

[794] See above, para. 367, for the terms on which it is proposed that an injured State be entitled to take countermeasures.

countermeasures by an injured State on its own account to deal with the situation where several States take, or are entitled to take, countermeasures in the collective interest. In particular the conduct of each of the States that takes such measures should be taken into account in the assessment of proportionality. These conditions and limitations are reflected in the proposed provision set out in paragraph 413 below.

403. A second situation concerns the question of collective countermeasures in cases where no State is "injured" in the sense of article 40 *bis* (1) — notably, breaches of human rights obligations, owed to the international community as a whole but affecting only the nationals of the responsible State. The difficulty here is that, almost by definition, the injured parties will lack representative organs which can validly express their wishes on the international plane, and there is a substantial risk of exacerbating such cases if third States are freely allowed to take countermeasures based on their own appreciation of the situation. On the other hand it is difficult to envisage that, faced with obvious, gross and persistent violations of community obligations, third States should have no entitlement to act.

404. In various contexts, especially those involving human rights and humanitarian law, a distinction is drawn between individual violations of collective obligations, and breaches which have a gross and systematic character. Moreover this is done even where the underlying rule is the same for individual and for gross or systematic breaches (as it often is). For example:

- The European Court of Human Rights has distinguished between individual complaints and cases involving systematic violations amounting to a practice of inhuman or degrading treatment or punishment, holding the exhaustion of local remedies rule inapplicable in the latter case.[795]
- The procedure established by ECOSOC Resolution 1503 (XLVIII) of 27 May 1970 targets cases involving "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms".[796]
- The definition of crimes against humanity as a matter of general international law implies a threshold of systematic or widespread violations, either in terms or (as with genocide and apartheid) by necessary implication from the very definition of the prohibited acts.[797]

Attention should also be drawn to the justification for the ban on airline flights to Yugoslavia, as articulated by the EC Council in its Regulation No. 1901/98 of 7 September 1998. The recital alleged, *inter alia* ...

[795] *Ireland v. United Kingdom*, E.C.H.R. Ser. A, No. 25 (1978), discussed in Second Report (A/CN.4/498, 1999), para. 123.

[796] For an assessment of the Resolution 1503 procedure see e.g. P. Alston, "The Commission on Human Rights" in P. Alston (ed.), *The United Nations and Human Rights* (Oxford, Clarendon Press, 1992), p. 126 at pp. 145-155.

[797] See e.g. the definition of "crimes against humanity" in article 7 of the Rome Statute of the International Criminal Court, 1998, reflecting the Commission's own definition in art. 18 of the Draft Code of Crimes against the Peace and Security of Mankind: in *I.L.C. Report ... 1996* (A/51/10) ch. 2.

"indiscriminate violence and brutal repression against its own citizens, which constitute serious violations of human rights and international humanitarian law ..."[798]

405. As a matter of policy, the constraints and inhibitions against collective countermeasures — in particular, concern about due process for the allegedly responsible State, the problem of intervention in and possible exacerbation of an individual dispute — are substantially reduced where the breach concerned is gross, well-attested, systematic and continuing. To disallow collective countermeasures in such cases does not seem appropriate. Indeed to do so may place further pressure on States to intervene in other, perhaps less desirable ways. It is not the function of the Commission to examine in the present context the lawfulness of humanitarian intervention in response to gross breaches of community obligations.[799] But at least it can be said that international law should offer to States with a legitimate interest in compliance with such obligations, some means of securing compliance which does not involve the use of force.

406. For these reasons, the Special Rapporteur proposes that the Draft articles should allow States parties to a community obligation to take collective countermeasures in response to a gross and well-attested breach of that obligation, in particular in order to secure cessation and to obtain assurances and guarantees of non-repetition on behalf of the non-State victims.[800] Such countermeasures should comply with the other conditions for countermeasures laid down in the Draft articles, and in particular they should not, taken together, infringe the requirement of proportionality. The text should reflect this restriction rather than implying — as did articles 40 and 47 as adopted on first reading — that individual countermeasures are a corollary to all kinds of injury broadly defined.

C. Additional consequences of "gross breaches" of obligations to the international community as a whole

407. The next question is whether further consequences can be attached to the category of gross, egregious or systematic breaches of obligations to the international community as a whole.[801] Of course, the general legal consequences of

[798] *O.J.E.C.* L 248, 8 September 1998, p.1.

[799] As the International Court noted in its Order of 2 June 1999 in the *Cases concerning Legality of Use of Force*, para. 17, "the use of force in Yugoslavia ... under the present circumstances ... raises very serious issues of international law".

[800] See also above, paras. 115-116 and table 2.

[801] In the Draft articles adopted on first reading, it was noted that, instead of the term "crime", "alternative phrases such as 'an international wrongful act of a serious nature' or 'an exceptionally serious wrongful act' could be substituted" (see note to art. 40). It should be stressed that some of these gross breaches are distinct legal wrongs in themselves, since the definition of the wrong of itself ensures that only severe or extreme cases are covered (e.g. genocide, crimes against humanity). Others (e.g. torture) are general legal wrongs which in circumstances of extreme or systematic application would fall within the category. It has been suggested that a draft article be added to make this clear. This might be located in Chapter I of Part Two and might provide that:

"The obligations of the responsible State set out in this Part may be owed to another State, to several States, to all other States parties or to the international community as a whole, depending on the character and content of the international obligation and on the circumstances of the breach, and irrespective of whether a State is the ultimate beneficiary of the obligation."

responsibility will apply to such breaches, and their incidence will be more substantial in proportion to the gravity of the breach. But are there any further legal consequences applicable to "gross breaches" as such? It is necessary to distinguish the question of additional obligations on the responsible State and possible consequences for other States.

408. So far as the responsible State itself is concerned, it is remarkable that the Draft articles on first reading only proposed the following consequences of crimes as defined in article 19:

(1) restitution was required, even if the burden of providing restitution was out of all proportion to the benefit gained by the injured State instead of compensation (article 52 (a), disapplying article 43 (c) in case of crimes);

(2) restitution could seriously jeopardize the political independence or economic stability of the responsible State (article 52 (a), disapplying article 43 (d));

(3) measures by way of satisfaction could "impair the dignity" of the responsible State (article 52 (b), disapplying article 45 (3)).

If, as recommended, article 43 (d) is deleted,[802] only the first and third of these "consequences" will remain, and it is very difficult to envisage actual cases in which either will make any difference. As to the first, in the absence of a valid election of compensation in lieu of restitution by the injured party,[803] restitution (if it is possible) will be effectively mandatory, having regard to the importance of the values associated with obligations to the international community as a whole, and the need not to condone their violation. As to the third, the main element of the proposed article 45 (4) is now proportionality,[804] and there is no need to "humiliate" even a State which has committed a gross breach of a community obligation. In the Special Rapporteur's view, these "consequences" are trivial, incidental and unreal, and should be deleted.

409. On the other hand, having regard to the values underlying article 19 — which are valid whether or not one accepts the language of "crimes" to express them — then there is a case for damages to be awarded for gross breach in a way that will reflect the gravity of the breach and deter its commission in future. It has been argued that the imposition of penalties by some centralized judicial process, equivalent to that under article 228 of the EC Treaty, is beyond the scope of the present text, and would require a special regulatory regime which is presently lacking, and which the Draft articles cannot realistically create.[805] The position with respect to punitive damages is not necessarily the same, however, and it can be envisaged that an injured State could be held entitled to demand punitive damages. In reality, following gross and systematic breaches of community obligations, there will always be a much wider group of persons indirectly affected, and major restoration work to be done. For the purposes of discussion, the Special Rapporteur proposes that in the case of gross breach of community obligations, the responsible State may be obliged to pay punitive damages. Alternatively, if the present

[802] See above, para. 145 (d).

[803] To the extent that restitution relates to the continuing performance of the primary obligation, it may be that not even the injured State can validly waive it: see above, paras. 134, 253.

[804] See above, para. 193.

[805] See above, paras. 382-383.

formulation of article 45 (2) (c) is not retained in relation to breaches more generally,[806] it could be applied to the category of gross breaches.

Additional obligations for other States faced with gross breaches of community obligations?

410. If article 52 as adopted on first reading envisaged few or no additional obligations for the responsible State, article 53 did — paradoxically — envisage such obligations for third States. In respect of the gross breaches referred to in article 19, third States were obliged ...

> "(a) not to recognize as lawful the situation created by the crime;
>
> (b) not to render aid or assistance to the State which has committed the crime in maintaining the situation so created;
>
> (c) to cooperate with other States in carrying out the obligations under subparagraphs (a) and (b); and
>
> (d) to cooperate with other States in the application of measures designed to eliminate the consequences of the crime."

These consequences were analysed in an earlier Report.[807] There the point was made that, leaving to one side the controversial terminology of "crimes", they are broadly acceptable, but only so long as they do not carry *a contrario* implications for other breaches which may not be egregious, systematic or gross. States may not recognize as lawful, for example, a unilateral acquisition of territory procured by the use of force, even if the use of force was arguably lawful. States may not lawfully assist in the detention of hostages, even in isolated cases. Again, for the purposes of discussion, the Special Rapporteur proposes a consolidated version of articles 51-53. The commentary should make it clear that the consequences spelt out may apply in other cases also, depending on the context and the content of the applicable primary rule.

Leaving scope for further developments

411. It is obvious that issues of the salience and enforcement of community obligations are undergoing rapid development.[808] Older structures of bilateral State responsibility are plainly inadequate to deal with gross violations of human rights and humanitarian law, let alone situations threatening the survival of States and peoples. The Draft articles cannot hope to anticipate future developments, and it is accordingly necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as a crime, or as a breach of an obligation to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur's view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change.

---

[806] As proposed in para. 191 above.

[807] First Report (A/CN.4/490/Add.1), para. 51.

[808] See above, paras. 372, 391 and cf. para. 382.

D. Summary of conclusions as to Part 2, Chapter III and Part 2 *bis*

412. For these reasons, the Special Rapporteur proposes that the text of Part 2, Chapter III should read as follows:

> **[Chapter III**
> **Serious breaches of obligations to the international community as a whole**
>
> *Article 51*
> *Consequences of serious breaches of obligations to the international community as a whole*
>
> (1) This Chapter applies to the international responsibility that arises from the serious and manifest breach by a State of an obligation owed to the international community as a whole.
>
> (2) Such a breach entails, for the State responsible for that breach, all the legal consequences of any other internationally wrongful act and, in addition, [punitive damages] [damages reflecting the gravity of the breach].
>
> (3) It also entails, for all other States, the following further obligations:
>
> (a) not to recognize as lawful the situation created by the breach;
>
> (b) not to render aid or assistance to the State which has committed the breach in maintaining the situation so created;
>
> (c) to cooperate in the application of measures designed to bring the breach to an end and as far as possible to eliminate its consequences.
>
> (4) Paragraphs 2 and 3 are without prejudice to such further penal or other consequences that the breach may entail under international law.]

Since the proposed Chapter III is self-contained, and since article 19 adopted on first reading played no role whatever in Part 1, if Chapter III is adopted article 19 itself can be deleted. The commentary will need to explain in further detail the limited content of the category to which Chapter III applies and the non-exclusiveness of the consequences set out in paragraph (3).

413. A number of provisions must also be added to Part Two *bis* as already proposed. First of all, article 40 *bis* as already proposed should make it clear in what respects the broader category of States (referred to in paragraph (2)) is entitled to invoke responsibility, in accordance with the recommendations already made.[809] The conditions for the invocation of responsibility laid down in Part Two *bis* should also apply as far as necessary to such States.[810] In addition the following provisions should be added to that Part:

---

[809] See above, paras. 378-379.

[810] This can be achieved by adding to proposed art. 40 *bis* provisions to the effect that an injured State may invoke all the consequences of an internationally wrongful act in accordance with Part Two. In addition the following paragraph should be added in relation to the broader category of States presently referred to in art. 40 *bis* (2):

> "A State referred to in paragraph (2) may seek:
> (a) cessation of the internationally wrongful act, in accordance with article 36 *bis*;
> (b) on behalf of and with the consent of the injured State, reparation for that State in accordance with article 37 *bis* and Chapter II;

Article 50A[811]
Countermeasures on behalf of an injured State

Any other State entitled to invoke the responsibility of a State under [article 40 *bis* (2)] may take countermeasures at the request and on behalf of an injured State, subject to any conditions laid down by that State and to the extent that that State is itself entitled to take those countermeasures.

Article 50B
Countermeasures in cases of serious breaches of obligations to the international community as a whole

(1) In cases referred to in article 51 where no individual State is injured by the breach, any State may take countermeasures, subject to and in accordance with this Chapter, in order to ensure the cessation of the breach and reparation in the interests of the victims.

(2) Where more than one State takes countermeasures under paragraph 1, those States shall cooperate in order to ensure that the conditions laid down by this Chapter for the taking of countermeasures are fulfilled.

VI. Part Four
General provisions

414. Finally, it is necessary to bring together certain saving clauses already adopted on first reading, or subsequently proposed, and to consider what other provisions of a general character might be included in Part Four. Part Four is to be understood as a general and concluding part, clarifying certain matters with which the Draft articles do not deal, and spelling out certain relationships between the Draft articles and other rules, and fields, of international law.

A. Existing articles

1. Article 37 (*lex specialis*)

415. Article 37 as adopted on first reading is headed "*lex specialis*". It provides:

> "The provisions of these draft articles do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act."

(c) where there is no injured State:
(i) restitution in the interests of the injured person or entity, in accordance with article 43, and
(ii) [punitive damages] [damages reflecting the gravity of the breach], in accordance with art. 51 (2), on condition that such damages shall be used for the benefit of the victims of the breach."

In addition art. 46 *ter* as already proposed (above, para. 284) can apply to any State invoking responsibility, whether or not it is an injured State.

[811] These articles would come before art. 50 *bis* (Suspension and termination of countermeasures) as proposed above, para. 367.

416. The very brief commentary to article 37 stresses "the *residual* character of the provisions of part 2",[812] and notes that, either in the instrument creating the primary obligation in question or otherwise, States may "determine the legal consequences, as between them, of the internationally wrongful act involved". The only limitation upon this freedom, according to the commentary, is that States may not, even *inter se*, "provide for legal consequences of a breach of their mutual obligations which would authorize acts contrary to peremptory norms of general international law, nor escape from the supervision of the competent United Nations organs by virtue of their responsibilities relating to the maintenance of international peace and security".[813]

417. Government comments on draft article 37 have supported the principle;[814] indeed a number of governments have suggested that it should apply generally to the draft articles.[815] The Czech Republic raises the relationship between the provisions of article 37 and "crimes" as dealt with in article 19, suggesting that it would be useful to review the wording of draft article 37 "with a view to making it clearer that the provisions of part two, when they deal with the regime applicable to 'crimes', are no longer simply residual in character".[816] It points out that if "crimes" consist of breaches of peremptory rules of *jus cogens*, the secondary rules applicable to them "must also be peremptory in nature, with no possibility of derogating from them by means of an agreement *inter partes*".[817]

418. Switzerland raises the relationship between draft article 37 and article 60 of the 1969 and 1986 Vienna Conventions on the Law of Treaties, noting that on the current wording of article 37, the termination of a treaty in accordance with these provisions "could be considered as precluding all other consequences, namely, those deriving from the draft articles on State responsibility".[818] It suggests that this situation should be clarified and that a reservation concerning article 60 of the Vienna Conventions on the Law of Treaties might be appropriate.[819]

---

[812] Commentary to art. 37, para. (1) (emphasis in original). No examples are given.

[813] Ibid., para. (2).

[814] See the discussion held in the Sixth Committee in which "the remark was made that the draft should continue to respect *lex specialis*" (A/CN.4/496, p. 20). The Sixth Committee has noted that specific treaty regimes providing their own framework for the responsibility of States would ordinarily prevail over the provisions of the draft articles (regardless of their eventual form) (ibid.). Likewise, at its fifty-fourth session it was noted that the draft articles "would not apply to self-contained legal regimes, such as those on the environment, human rights and international trade, which had been developed in recent years" (A/CN.4/504, p. 9).

[815] See comments by Germany (A/CN.4/488, p. 33), the United States (ibid., p. 84), the United Kingdom (ibid., p. 28) and Japan ("the precedence given to the *lex specialis* rule certainly cannot be unique to Part Two, but may also be relevant to Part Three or even Part One": A/CN.4/492, p. 12). See also the observation made in the Sixth Committee that "the Commission should draft the articles on the assumption that the rule of *lex specialis* should be transformed into a general principle" (A/CN.4/496, p. 20).

[816] A/CN.4/488, p. 92.

[817] Ibid.

[818] Ibid.

[819] The discussion in the Sixth Committee also stressed the importance of respecting the "parellelism between the law of treaties and the law of international responsibility, while making it clear the complementarity of the draft articles with the Vienna Convention" (A/CN.4/496, p. 20).

419. As to the location of the draft article, Japan suggests that it should be placed in Part One, Chapter I of the draft.[820] France, on the other hand, considers that the draft article could be included in either the introductory or final provisions of the draft articles as, along with articles 38 and 39, it deals "with the relationship between the draft articles and external rules, and emphasize[s] the supplementary nature of [the] text".[821]

420. States often make specific provision for the legal consequences of breaches of particular rules. The question then is whether those consequences are exclusive, in other words, whether the consequences which would otherwise apply under general international law are thereby excluded. This is always a question of interpretation in each case, which no provision such as article 37 can prejudge. In some cases it will be clear from the language of a treaty or other text that only the consequences specified flow. In other cases, one aspect of the general law may be modified, leaving other aspects still applicable. An example of the former is the WTO Dispute Settlement Understanding as it relates to remedies.[822] An example of the latter is article 41 (formerly 50) of the European Convention on Human Rights.[823] Both concern matters dealt with in Part 2 of the Draft articles, but the same considerations apply, in principle, to Part 1. Thus a particular treaty might impose obligations on a State but define the "State" for that purpose in a way which produced different consequences than would otherwise flow from the rules of attribution in Chapter II of Part 1.[824]

421. The Special Rapporteur agrees with the view that article 37 should apply generally to the Draft articles, and that it should accordingly be placed in Part 4. A version of article 37, leaving open the question of interpretation, is accordingly proposed.[825]

2. Article 39 (relationship to the Charter of the United Nations)

422. Article 39 provides as follows:

> *"Relationship to the Charter of the United Nations*
>
> The legal consequences of an internationally wrongful act of a State set out in the provisions of this Part are subject, as appropriate, to the provisions and procedure of the Charter of the United Nations relating to the maintenance of international peace and security."

423. Government comments on draft article 39 have been somewhat mixed. A number of States seem to view as unproblematic the precedence given by the draft article to the Charter mechanism for the maintenance of international peace and

[820] A/CN.4/492, p. 12.
[821] A/CN.4/488, p. 92.
[822] See above, para. 157, note 311.
[823] See above, para. 156, note 304.
[824] Cf. "federal" clauses in treaties, allowing certain component units of the State to be excluded from the scope of the treaty (e.g. the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965, arts. 70, 72), or limiting obligations with respect to such units (e.g. UNESCO Convention for the Protection of the World Cultural and Natural Heritage, 1972, art. 34).
[825] See below, para. 429.

security over the provisions of Part Two of the draft articles.[826] The United States, for instance, "agrees with the objective of the draft article in emphasizing that the Charter's allocation of responsibility for the maintenance of peace and security rests with the Security Council, and that an act of a State, properly undertaken pursuant to a Chapter VII decision of the Security Council cannot be characterized as an internationally wrongful act".[827] In its view, Article 103 "not only establishes the pre-eminence of the Charter, but (sic) it makes clear that subsequent agreements may not impose contradictory obligations on States". Thus, "the draft articles would not derogate from the responsibility of the Security Council to maintain or restore international peace and security".[828]

424. France, on the other hand, is concerned that draft article 39 "appears to run counter to Article 103 of the Charter of the United Nations, which makes no distinction between the provisions of the Charter"[829] and suggests that such a provision would "have the effect of restricting the prerogatives of the Security Council".[830] France considers that it would be preferable to state that the provisions of the draft articles do not impair the provisions and procedures of the Charter of the United Nations, in accordance with Article 103 thereof, and proposes reformulation of the article as follows:

> "The provisions of the present articles are without prejudice to the provisions and procedures of the Charter of the United Nations, pursuant to Article 103 thereof".[831]

The United Kingdom, though it supports the principle of pre-eminence of the Charter reflected in Article 103 and draft article 39, opposes addressing the question of the relationship between the rights and obligations of States under the law of State responsibility and under the Charter of the United Nations in the draft articles. In its view, this question "raises complex issues, which concern not only the United Nations but also other international and regional organizations which may be acting in conjunction with the United Nations or in roles assigned to them under the Charter".[832]

425. As to the location of the draft article, France believes that it could be included in the final or introductory provisions of the draft articles.[833] Japan is in favour of

---

[826] See comments of the Czech Republic (discussing responses to "international crimes" and noting that "in the field of the maintenance of international peace and security ... there is in fact already a specific mechanism, which is appropriately covered by draft article 39" (A/CN.4/488, p. 94)), Mongolia (emphasizing that the text "should take into full account the current situation concerning the measures which the United Nations is taking under Chapter VII of its Charter (*ibid.*)) and Japan ("It is evident that under such provisions as Article 103 of the Charter of the United Nations and article 39 of the draft articles, the Charter of the United Nations has precedence over the draft articles" (A/CN.4/492, p. 13).

[827] A/CN.4/488, p. 95.

[828] Ibid. The United States further notes that "State responsibility provisions may inform the Security Council's decision-making, but the draft articles would not govern its decisions".

[829] Ibid., p. 94.

[830] Ibid.

[831] Ibid.

[832] Ibid., p. 95.

[833] Ibid., p. 94.

placing the article in Part One, Chapter I "[a]s article 39 is related to the draft articles as a whole".[834]

426. The Special Rapporteur agrees in principle with this view, although having regard to the content of Part One, Chapter I, article 39 is better placed in Part Four. He also agrees that there is no need to single out those provisions of the Charter relating to the maintenance of international peace and security, or to use the qualifying phrase "where appropriate", which is suggestive but lacks meaning.[835] Article 103 of the Charter is comprehensive and categorical: its effect, whatever it may be, can be reserved in a simple provision.[836]

B. Proposed additions to Part Four

427. It has become usual for texts proposed by the Commission (whether for adoption in treaty form or otherwise) to contain a range of saving and other general clauses. These are intended to delimit the scope of the text and to preserve cognate legal questions. A conspicuous example is the Vienna Convention on the Law of Treaties, which reserves cases of State succession, State responsibility and the outbreak of hostilities (article 73) as well as the case of an aggressor State (article 75). Any function the latter article may play is performed here by article 39, and it does not seem necessary to refer to questions of State succession in the Draft articles.[837] On the other hand, there has been uncertainty and confusion over the relations between suspension or termination of treaties and the non-performance of treaty obligations by way, for example, of countermeasures. It seems appropriate that the Draft articles return the compliment of article 73 of the Vienna Convention and expressly reserve any question as to the validity, suspension, termination or content of a treaty.[838] Indeed it might be asked whether the same should not be said about the content and applicability to a State of any rule of substantive customary international law, i.e. any rule specifying the content of an international obligation. To assist discussion, such a proposal is made below.

428. Other possible saving clauses include the following:

(a) *Reservation for responsibility of or for acts of international organizations*. This has already been proposed and was provisionally agreed by the Commission in 1998.[839]

---

[834] A/CN.4/492, p. 13.

[835] The language of article 39 adopted on first reading is strongly criticized by G. Arangio-Ruiz, "Article 39 of the ILC Draft Articles on State Responsibility", *Rivista di diritto internazionale*, vol. 83 (3), 2000, p. 1. He proposes either the deletion of article 39 altogether, or a provision which does not go "further than Article 103 of the Charter in a way which may lead to distortions of the régime of State responsibility". For the reasons given in the text the present Special Rapporteur proposes a simple saving clause relating to article 39, and is therefore consistent with the latter alternative.

[836] See below, para. 429.

[837] It is controversial in what circumstances there can be succession to State responsibility. The Draft articles do not address that issue, which is an aspect of the law of succession rather than of responsibility.

[838] Cf. the Swiss proposal, above, para. 418.

[839] See *I.L.C. Report ... 1998* (A/53/10), para. 424.

(b) *Cases of diplomatic protection.* By contrast the relation between the Draft articles and the Commission's project on diplomatic protection cannot be expressed in terms of exclusion. The Draft articles cover cases of State responsibility in the field of diplomatic protection, as well as in the field of direct State-to-State injury, and this is so even though the secondary rules in the field of diplomatic protection will be specified in more detail in the course of the Commission's work on that topic. There seems no need to spell this out in the text; it can be made clear in the commentary.

(c) *Issues of invalidity and non-recognition.* Questions of fundamental validity of State acts fall outside the scope of the Draft articles, even though they may be, in some cases at least, consequential upon internationally unlawful conduct. Correlatively so do general questions of non-recognition, which concern issues either of fundamental validity or of State policy, as the case may be. Again, however, there seems no need to spell this out in the text as distinct from the commentary.

(d) *Non-retroactivity of the Draft articles.* Treaty texts based on the Commission's work often provide that they do not apply, as such, to events occurring prior to their entry into force, but without prejudice to the possible effect of any rule embodied in the treaty which reflects general international law.[840] Since no decision has yet been taken as to the possible form of the Draft articles, it seems unnecessary to consider such a clause at this stage.

(e) *Definition clauses.* The Draft articles have adopted a strategy of defining terms as required for particular purposes in particular articles. No separate definition clause seems to be required.

C. Summary of conclusions as to Part Four

429. For these reasons, the Special Rapporteur proposes that the text of Part Four should read as follows:

Part four
General provisions

Article 37
Special provisions made by other applicable rules

The provisions of these articles do not apply where and to the extent that the conditions for or the legal consequences of an internationally wrongful act of a State have been exclusively determined by other rules of international law relating to that act.

[840] See e.g. Vienna Convention on the Law of Treaties, 1969, art. 4. But there is no equivalent in the 1961 or 1963 Vienna Convention on Diplomatic and Consular Relations.

Article A
Responsibility of or for the conduct of an international organization

These articles shall not prejudge any question that may arise in regard to the responsibility under international law of an international organization, or of any State for the conduct of an international organization.

Article B
Rules determining the content of any international obligation

These articles are without prejudice to any question as to the existence or content of any international obligation of a State, the breach of which may give rise to State responsibility.

Article 39
Relationship to the Charter of the United Nations

The legal consequences of an internationally wrongful act of a State under these articles are without prejudice to article 103 of the Charter of the United Nations.